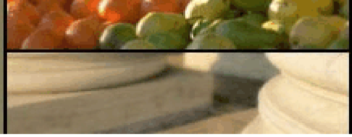
The National Agricultural Law Center



University of Arkansas School of Law
NatAgLaw@uark.edu $ (479) 575-7646

An Agricultural Law Research Article

This is *Our* Land: Ranchers Seek Private Rights in the Public Rangelands

by

Jeffrey J. Wechsler

Originally published in JOURNAL OF LAND, RESOURCES, AND ENVIRONMENTAL LAW
21 J. LAND RESOURCES & ENVTL L. 461 (2001)

www.NationalAgLawCenter.org

This Land is *Our* Land: Ranchers Seek Private Rights in the Public Rangelands

The water . . . controls the land. Wherever there is any water, there is a ranch.[1]

I. INTRODUCTION

There is possibly no more enduring symbol of the West than the rancher working on the public range.[2] Ranching became one of the dominant uses of the public lands in the 1800s when white settlers found much of the land west of the 100th meridian unsuitable for crop agriculture.[3] In the years that followed, the public lands were an "unregulated commons . . . [where] no statute checked the human desire to take the grass before someone else did."[4] The only control ranchers had over the public range was through the available water. Because cattle need water to survive,"[H]e who controlled the water, controlled the adjacent range."[5] Unfortunately, this lack of rules and structure led to overgrazing and significant damage to many native western ecosystems on the public lands.[6] In response, grazing on the forest lands was regulated by Congress and the federal land agencies beginning in the late 1890s and early 1900s,[7] and on the public lands by the Taylor Grazing Act of 1934.[8]

Currently, there is considerable conflict over whether the national policy of grazing on public lands should promote conservation or resource use and exploitation. Many who favor resource use see ranchers as the stewards of the land and guardians of the West's core values. To others, they are "welfare parasites" responsible for causing "intolerable damage to our public lands."[9] A

---

[1] James Muhn, *Public Water Reserves: The Metamorphosis of a Public Land Policy*, 21 J. Land Resources & Envtl. L. 67, 73 (2001) (quoting Pub. Lands Commn., *Report of the Public Land Commission Created by the Act of March 3, 1879, Relating to Public Lands in the Western Portion of the United States and to the Operation of Existing Land Laws*, 46 H.R. Exec. Doc. 46, at 14 (Feb. 25, 1880)).

[2] Todd M. Olinger, Student Author, *Public Rangeland Reform: New Prospects for Collaboration and Local Control Using the Resource Advisory Councils*, 69 U. Colo. L. Rev. 633, 633 (1998).

[3] George Cameron Coggins, Parthenia Blessing Evans & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 Envtl. L. 535, 541 (1982) [hereinafter Coggins, *The Law*].

[4] *Id.* at 547.

[5] Muhn, *supra* n. 1, at 73.

[6] Coggins, *The Law*, *supra* n. 3, at 547. Overgrazing causes a loss in species diversity, watershed protection, and wildlife habitat as well as causing soil loss and desertification. Olinger, *supra* n. 2, at 642.

[7] *See* George Cameron Coggins, Charles F. Wilkinson & John E. Leshy, *Federal Public Land and Resources Law* 693 (3d ed., The Foundation Press, Inc. 1993) [hereinafter Coggins, *Public Land*].

[8] Ch. 865, 48 Stat. 1269 (1934) (codified at 43 U.S.C. §§ 315–315r).

[9] Edward Abbey, *Even the Bad Guys Wear White Hats*, Harper's 51, 53 (Jan. 1986). Abbey describes cattle as "a pest and a plague," and advocates "putting the public lands livestock grazers out of business." *Id.*

new voice in this debate has risen from a modern generation of property rights advocates called Sagebrush Rebels.[10] Proponents of this "wise-use movement" seek local control of federal land, and argue that they need to "reclaim the West from the feds and rescue their endangered way of life."[11]

Rancher Wayne Hage, one of the philosophical leaders of the Sagebrush Rebellion, claims that ranchers have a constitutionally protected right to graze livestock on public lands.[12] In his book, *Storm Over Rangelands*, Hage compares the frustration with federal land ownership to a storm and suggests that a "cloud" exists on its title.[13] After modifications were made to his grazing permit in the late 1980s, Hage filed a lawsuit seeking to establish his right to graze on public lands.[14] In his lawsuit, he makes two significant claims. First, he asserts a property interest in the public lands that vested prior to the creation of the permit system; and second, he contends that the right to graze is appurtenant to his state-perfected water right.[15] Based on these claimed property rights, Hage concludes that he is entitled to compensation for revocations and modifications of his

But see Florence Williams, *The Compensation Game; Compensation for Loss of Rights in Public Lands*, 57 Wilderness 28, 28 (1993) (finding that from rancher Wayne Hage's perspective, "environmentalists" like Abbey "are committed to the destruction of private property").

[10] *See* Coggins, *The Law*, *supra* n. 3, at 553. Coggins details three legal positions of the Sagebrush Rebellion: 1) The federal government has a constitutional duty to divest itself of public lands; 2) States were coerced into relinquishing claims to public land; and 3) It is "fundamentally unfair" for the federal government to own disproportionately large amounts of land in the western states. *Id.* at 574. *See also* Doug Harbrecht, *A Question of Property Rights and Wrongs*, 32 Natl. Wildlife 4 (Oct. 1994).

[11] Mary Lou Gallagher, *Wise Use or Wise Marketing?*, 62 Planning 4, 4 (1996). *See also* Florence Williams, *Sagebrush Rebellion II*, High Country News 1, 10–11 (Feb. 24, 1992) (finding the term "wise use movement" is used as an umbrella for organizations subscribing to the tenets of the Sagebrush Rebellion); Jim Carrier, *Rebels on the Range: Nevadans Take on Federal Sovereignty*, Denver Post A1 (Jan. 21, 1996) (compiling a list of "Sagebrush Rebellion" court cases and finding that the movement has "failed to take back the West from the United States").

[12] Ed Vogel, *Nevada Rancher Presses Suit Against Federal Government*, Las Vegas Rev.-J. B4 (Oct. 2, 1998). Wayne Hage is seen as one of the leaders of the wise-use movement. One of the best publicized moments of the movement occurred in 1994 in Nye County, Nevada when County Commissioner Dick Carver "celebrated" the Fourth of July by bulldozing an illegal road through the national forest from his ranch to one owned by Hage. Gallagher, *supra* n. 11, at 4. Carver has stated that "[a]fter a thorough review of the United States Constitution . . . it does not contain any authorization for the Federal Government of the United States to own, hold, or exert its dominion over any public lands except for whatever land it needs for its own governmental purpose as specified." Lonnie Williamson, *And Justice for All; Dispute Over Land Ownership and Grazing Rights to be Settled in Court*, 193 Outdoor Life 34 (1994).

[13] Wayne Hage, *Storm Over Rangelands: Private Rights in Federal Lands* 1 (3d ed., Free Enterprise Press 1994).

[14] The suit was originally filed in 1991. *Hage v. U.S.*, Civ. No. 91-1470L (Cl. Ct. filed Oct. 1, 1991). Explaining his lawsuit Hage has said "you can roll over and play dead and leave that heritage to your children, or you can stand your ground and fight, and risk losing everything you have. I'd rather go down fighting." Williams, *supra* n. 9, at 28. Supporters of Hage's lawsuit have called it "one of the most important lawsuits on property rights in American history." Hage, *supra* n. 13, at x. Finally, Hage is partially funding his lawsuit with a painting entitled "Stewards of the Range" which was donated by an artist known for a painting that President Ronald Reagan kept in the Oval Office. Betsy Z. Russell, *Land Rights Duo Make Home on the Range; Chenoweth to Wed Cattleman and Activist Wayne Hage*, The Spokesman-Rev. A1 (Oct. 2, 1999).

[15] *Hage v. U.S.*, 35 Fed. Cl. 147, 156 (1996).

grazing permit. Although his first claim was denied,[16] Chief Judge Loren Smith,[17] of the United States Court of Federal Claims, is "on the verge" of accepting Hage's second argument, thereby "adopting a revolutionary new takings theory that would eviscerate public ownership of hundreds of millions of acres of land in the western United States."[18]

This note focuses on water rights and grazing. By critically analyzing *Hage v. United States* (*Hage II*),[19] it will attempt to answer the question of whether a vested water right entitles a rancher to graze livestock on the public lands. Part II provides an overview of the factual and legal aspects of both *Hage* cases. Part III examines the argument that the right to graze on public lands is appurtenant to a water right, concluding that the United States Court of Federal Claims may have been in error when it held as it did. Finally, Part IV concentrates on the merits of Hage's Fifth Amendment Takings Clause claim, finding that the reasonable investment-backed expectations and background principles of law suggest that it should fail.

II. CASE OVERVIEW

A. The Pine Creek Ranch

The Pine Creek Ranch is located on approximately 7,000 acres of private land in central Nevada.[20] Cattle ranching has been the dominant use of the ranch since its establishment in 1865.[21] The arid nature of the region, however, has historically forced the owner to rely on the use of the nearby public lands for water and roughly 750,000 acres of range to feed his cattle.[22] A grazing permit for the use of the range was first required in 1907 following the creation of the Toiyabe National Forest from the previously open forest lands bordering the Pine Creek Ranch.[23]

---

[16] *Id.* at 170.

[17] Judge Smith, who was appointed by President Ronald Reagan, has been characterized as a property rights advocate and "a leading champion of the idea that courts should read the 'takings' clause of the Fifth Amendment expansively in order to rein in government regulation." John D. Echeverria, *Don't Make Poor Choice, Judge Smith*, The Natl. L.J. A21 (Feb. 1, 1999); Williams, *supra* n. 9, at 28 (noting that Smith "recently ruled in favor of a New Jersey developer prevented by the Clean Water Act from building luxury homes on a salt marsh").

[18] Echeverria, *supra* n. 17.

[19] 42 Fed. Cl. 249 (1998).

[20] *Hage*, 35 Fed. Cl. at 153.

[21] *Id.*

[22] *Id.* The 750,000 acres of public lands used by the Pine Creek Ranch for cattle is managed by both the BLM and the USFS. Vogel, *supra* n. 12, at B4.

[23] *Hage*, 35 Fed. Cl. at 153. In 1865, the original owners of Pine Creek Ranch were able to use the public range under an "implied license." *See Buford v. Houtz*, 133 U.S. 320, 326 (1890) (holding an implied

Wayne and Jean Hage purchased Pine Creek Ranch in 1978 from Frank Arcularius.[24] During Arcularius' ownership, the United States Forest Service (USFS) implemented a "range restoration" program on the Toiyabe National Forest.[25] The efforts were a success, and "once-battered vegetation recovered to thriving proportions."[26]

Hage was issued his first grazing permit[27] based on preferential use on October 30, 1978.[28] This permit allowed cattle to be grazed on six allotments and established the terms and requirements of Hage's use of the public land.[29] It included provisions for the number and class of livestock authorized as well as the location and use of the range.[30] Significantly, the federal government reserved the "broad power to suspend, revoke or amend the permit subject to certain conditions."[31] Specifically, part 1, section 4 of the permit states, "This permit may be modified at any time during the term to conform with needed changes brought about by law, regulations, executive orders, allotment management plans, land management planning, numbers permitted or season of use necessary because of resource condition or other management needs."[32]

Conflict between Hage and the USFS began soon after the purchase of the ranch when, in 1979, the USFS permitted the Nevada Department of Wildlife to release elk in the Table Mountain allotment for the purpose of hunting.[33] Hage argued that the elk "drank water and ate forage which belonged" to Pine Creek Ranch.[34] Later, in 1981, Hage filed a water rights adjudication for the Meadow

license grew out of the federal government's tacit acquiescence to use of the public domain).

[24] Williamson, *supra* n. 12, at 34.

[25] *Id.*

[26] *Id.*

[27] *See* 36 C.F.R. § 222.3 (2000) (stating that "unless otherwise specified by the Chief, USFS, all grazing and livestock use on National Forest System lands and on other lands under USFS control must be authorized by a grazing or livestock use permit").

[28] *Hage*, 35 Fed. Cl. at 153. A grazing preference is the amount of forage, calculated in animal unit months (AUMs), that can be used during the grazing season. In order to acquire a grazing preference from the BLM or the USFS, it is necessary to own either land that can support the livestock for a period during the year, or water. Frank J. Falen & Karen Budd-Falen, *The Right to Graze Livestock on the Federal Lands: The Historical Development of Western Grazing Rights*, 30 Idaho L. Rev. 505, 507 (1993). "A [grazing] preference is a type of property right, protected by the Fifth Amendment of the United States Constitution." *Id.* at 506. The USFS regulations governing grazing preferences can be found at 36 C.F.R.§ 222.3(c)(1)(vi)(A).

[29] *Hage*, 35 Fed. Cl. at 153.

[30] *Id.* Many permits, like Hage's have specifications detailing the time of year that grazing is allowed. Ranchers often have the right to graze cattle on public lands during the summer months, and rely on alfalfa during the winter months. David Abelson, Student Author, *Water Rights and Grazing Permits: Transforming Public Lands into Private Lands*, 65 U. Colo. L. Rev. 407, 408 (1994).

[31] *Hage*, 35 Fed. Cl. at 153.

[32] *Id.* (quoting Hage's grazing permit).

[33] *Id.* at 154.

[34] *Id.*

Canyon allotment to block the USFS from diverting the flow of water in springs that he claimed.[35]

During the mid-to-late 1980s, the relationship between Hage and the USFS deteriorated. In 1988, Hage failed to remove his cattle from the Table Mountain allotment by the required seasonal deadline claiming that "recreational and Forest Service activities on the rangeland" obstructed his efforts.[36] In response, the USFS suspended twenty percent of the number of cattle permitted on the allotment for the 1989 grazing season.[37] By 1990, the USFS had initiated several additional actions to modify, suspend, or cancel Hage's grazing permits on the Table Mountain and Meadow Canyon allotments because of multiple permit violations.[38] In addition, in 1990, USFS range conservationists studied the Meadow Canyon allotment and concluded:

> [T]hat the permittee had been instructed to remove livestock from the allotment and had refused; gates were left open, allowing livestock to 'regraze' the allotment; the regrazing had 'weakened' the plants and possibly reduced stream-bank stability; meadows were 'trampled;' and damage was 'occurring to the soil, vegetation and water resources.'[39]

The recommendation of the USFS was for the allotment to be placed on "nonuse status for resources protection for a minimum of five years."[40]

Based on this recommendation and the "serious range deterioration," in August of 1990, the USFS required Hage to remove his cattle from the Meadow Canyon allotment two months early and informed him that any livestock found on that allotment would be impounded.[41] That winter, the USFS officially suspended the permit for five years and cancelled thirty-eight percent of the cattle permitted on the allotment.[42] Finally, in the summer of 1991, the USFS followed

---

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 154–55 (violations included "non-use" of an allotment and failure to control and take account of their livestock during the 1990 grazing season).

[39] Williamson, *supra* n. 12, at 34.

[40] *Id.* Writing about the condition of the range on the Meadow Canyon allotment, Williams found:

> Recently, I inspected trout streams on some of this land. Cattle had stripped the willows that had cooled the water. Now you could park tractor trailers in the dry, blownout channels; and marching in from all compass points are unpalatable plants like wire grass, sage and rabbitbrush. Is this a wise use?

Ted Williams, *On the Fire Line For Conservation: If Secretary of the Interior Bruce Babbitt is Taking Heat from all Sides, He's Got to be Doing a Good Job*, 198 Outdoor Life 12 (1996). *But see Hage*, 35 Fed. Cl. at 155 (noting that Hage's expert witness "considered the Meadow Canyon allotment to be in good to excellent condition when compared with other Western rangeland").

[41] *Hage*, 35 Fed. Cl. at 155.

[42] *Id.*

through with its warning and impounded 104 of Hage's cattle for trespassing on the Meadow Canyon allotment.[43]

B. Legal History

At the heart of this suit is Hage's claim that he possesses compensable property interests in the grazing permit, water rights, ditch rights-of-way and forage.[44] He alleges the USFS violated his constitutional rights and took his property through "physical and regulatory actions."[45] Based on previous case law, the government sought summary judgment.[46]

1. Initial Court Action

In 1996, the United States Court of Federal Claims[47] released an initial opinion (*Hage I*) in which it granted the government summary judgement on the issue of Hage's property interest in his grazing permit.[48] Although Hage conceded that the permit itself was not property, he contended that it was issued in recognition of prior existing rights that were created by a combination of the severance of water from the land and the federal government's passive consent for ranching on public lands.[49] The court rejected this argument, finding instead that "all precedent indicates that the privilege to graze never created a property interest but rather a preference" entitling a party to "the right of first refusal, not a property right in the underlying land."[50] Thus, the court concluded that Hage did not possess a property interest in the grazing permit.[51]

The court, however, denied the government's motion for summary judgement on the water rights, ditch right-of-way and forage issues.[52] Judge

---

[43] Rod Fee, *The Day the Feds Confiscated Our Cattle; Wayne and Jean Hage of Pine Creek Ranch*, 91 Successful Farming 55 (1993) (characterizing the impoundment as "the day armed USFS employees swarmed their Meadow Canyon allotment").

[44] *Hage*, 35 Fed. Cl. at 156.

[45] *Id.*

[46] *Id.*; *see* Danielle M. Stager, Student Author, *Takings in the Court of Federal Claims: Does the Court Make Takings Policy in Hage?*, 30 U. Rich. L. Rev. 1183, 1185 (1996) (concluding that the court is not poised to set significant precedent in *Hage*).

[47] A takings case claiming more than $10,000 must be brought in the United States Court of Federal Claims. 28 U.S.C. §§ 1346(b), 1491(a) (1999).

[48] *Hage*, 35 Fed. Cl. at 171.

[49] Stager, *supra* n. 46, at 1191.

[50] *Hage*, 35 Fed. Cl. at 170. Judge Smith also notes that "[t]he Supreme Court unequivocally determined grazing on the public lands to be a privilege, revokable at the government's will." *Id.* at 174 (citing *Buford v. Houtz*, 133 U.S. 320 (1890); *Light v. U.S.*, 220 U.S. 523 (1911); *Omaechevarria v. Idaho*, 246 U.S. 343 (1918); *U.S. v. Fuller*, 409 U.S. 488 (1973)).

[51] *Hage*, 35 Fed. Cl. at 171.

[52] *Id.*

Smith noted that the Mining Act of 1866 (Mining Act)[53] "clearly acknowledges vested water rights on public lands" and the scope of that water right is determined by state law.[54] Hage claimed that under Nevada state law "the right to use water on the public lands and the right to graze . . . 'are inextricably intertwined.'"[55] It follows, Hage contended, that under the Mining Act his vested water right, as defined by Nevada law, includes a right "for the cattle to consume forage adjacent to the water."[56] Voicing support for this notion,[57] the court concluded that a trial was necessary to determine if "property rights in the forage stemming from the property right to make beneficial use of water in the public domain within Nevada" exist.[58] Two questions were to be answered at trial: 1) Did Hage own a property interest in the water rights, forage, and ditch rights-of-way?; and 2) if so, Did the USFS's actions constitute a regulatory taking requiring governmental compensation under the Fifth Amendment?[59]

2. 1998 Preliminary Opinion

In a "Preliminary Opinion" (*Hage II*)[60] issued in 1998, Judge Smith answered "yes" to the first of these two questions, thereby recognizing a property interest in Hage's ditch rights-of-way and forage rights.[61] In an unusual opinion, the court found that section 9 of the Mining Act recognized a ditch right-of-way, and that "[c]oncurrent" with the ditch right-of-way was "a limited right to forage . . . appurtenant to and a component of a vested water right."[62] In other words, the court concluded that Hage's water right included the right to graze the public lands. The scope of this right to forage is "contiguous with the scope of the ditch right-of-way: the ground occupied by the water and fifty feet on each side of the marginal limits of the ditch."[63]

After Hage's property rights were defined, the next question before the court was "What are the Fifth Amendment consequences of the government's exercise of their permit authority with regard to vested water rights?"[64] Simply

---

[53] Act of July 26, 1866, ch. 262, 14 Stat. 251 (1866) (codified as amended at 30 U.S.C. § 51; 43 U.S.C. § 661).

[54] *Hage*, 35 Fed. Cl. at 172.

[55] *Id.* at 175.

[56] *Id.*

[57] *Id.* (stating that "[o]bviously, there is some logical support for this proposition even in light of the small amount of knowledge of bovine behavior held by the court").

[58] *Id.* at 176.

[59] *Id.* at 178.

[60] *Hage*, 42 Fed. Cl. at 249.

[61] *Id.* at 250.

[62] *Id.* at 251.

[63] *Id.*

[64] *Id.* The court went on to pose the question "what is the meaning of a 'vested water right' if the

put, Did the revocation of the grazing permit constitute a taking of Hage's property interest in the forage?

III. FORAGE RIGHTS ON PUBLIC LANDS: A CRITICAL ANALYSIS OF THE HAGE DECISION

The *Hage II* court is the *first* and *only* court to find a private grazing interest in the public lands.[65] The implications of the decision are broad. It raises uncertainty about federal ownership of public lands and could have a "chilling effect on federal land managers who make decisions every day on how to balance competing demands for the use of hundreds of millions of acres."[66] In addition, as the government argued in *Hage I*, it may allow ranchers to "bootstrap" an interest in public lands through a vested water right, thereby acquiring something to which they are not otherwise entitled.[67] In light of the precedential impact of the *Hage II* court's ruling, it is valuable to critically analyze the decision. The *Hage II* court determined that the Mining Act created a private right in public lands because the right to the forage is appurtenant to a vested water right. However, a careful examination of the history and relevant constitutional, statutory and common law leads to the opposite conclusion.

A. Private Rights and Federal Control of the Public Lands

The United States Constitution provides that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the territory or other Property belonging to the United States."[68] The Supreme Court has characterized congressional authority under the Property Clause as "without limitations."[69]

Pursuant to this expansive grant of power, Congress passed the Homestead Act of 1862[70] to encourage settlement in the West. The act allowed

---

government can deny plaintiffs access and use by merely denying them a grazing permit?". *Id.*

[65] *Diamond Bar Cattle Co. v. U.S.*, 168 F.3d 1209, 1215 (10th Cir. 1999) (finding "only one court has intimated that as interest in federal land other than a ditch right-of-way or an easement for diversion of water from federal to private land is obtainable under the Mining Act of 1866").

[66] Williamson, *supra* n. 12, at 34.

[67] *Hage*, 35 Fed. Cl. at 174.

[68] U.S. Const. art. IV, § 3, cl. 2.

[69] *U.S. v. San Francisco*, 310 U.S. 16, 29 (1940); *Utah Power & Light Co. v. U.S.*, 243 U.S. 389 (1917).

[70] Ch. 75, § 1, 12 Stat. 392 (1862) (codified at 43 U.S.C. §§ 161-302) (repealed 1976). The settler could establish title to the lands provided that actual residence was shown within six months. Coggins, *Public Land*, *supra* n. 7, at 84.

settlers to acquire an interest in 160 acres of surveyed land in the public domain.[71] Lands in the West, however, are arid and require expansive areas of range for cattle to survive.[72] Settlers found 160 acres to be too small for a cattle operation so ranchers turned to the public domain to supplement their small private homesteads.[73] Unless formally reserved for federal use, the public lands at this time were open to all settlers for livestock purposes.[74] Ranchers who were fortunate enough to establish water rights "exercised considerable control over adjacent public lands by both lawful and unlawful means."[75] In *Buford v. Houtz*,[76] the Court found that private use of public lands was legal only because the federal government had acquiesced in the practice and thereby created an "implied license."[77] Thus, settlers had a right to use the public domain, but only because Congress had permitted the practice.

In 1884, in an attempt to ensure the open public range, Congress exercised its control over the public lands by outlawing the use of fences by private individuals on the public domain.[78] This law was challenged in *Camfield v. United States*[79] by a plaintiff who claimed that the federal government did not have the authority to regulate public lands.[80] The Court held that the Unlawful Enclosures Act was a valid exercise of congressional power and established the principle that the federal government has the right to regulate nuisances on federal lands.[81]

In the same year as the *Camfield* decision, Congress attempted to organize and manage the public lands by authorizing the reservation of lands as national forests in the Organic Administration Act of 1897.[82] One of the provisions of the act permitted the secretary of the interior[83] to issue rules and

---

[71] *Id.*

[72] Abelson, *supra* n. 30, at 408.

[73] *Id.* John Wesley Powell believed that 160 acres was too small for a homesteader to raise cattle. He advocated the creation of 2,560 acre homesteads with an inseparable water right. In addition, Powell argued that homesteads should follow watersheds and not be drawn arbitrarily. Wallace Stegner, *Beyond the Hundredth Meridian: John Wesley Powell and the Second Opening of the West* 226–27 (Houghton Mifflin Co. 1954).

[74] Coggins, *The Law*, *supra* n. 3, at 548.

[75] *Id.*

[76] 133 U.S. 320 (1890) (stating "there thus grew up a sort of implied license that these lands, thus left open, might be used so long as the government did not cancel its tacit consent").

[77] *Id.* at 326.

[78] *The Unlawful Enclosures Act*, ch. 149, 23 Stat. 321 (1884) (codified at 43 U.S.C. § 1061).

[79] 167 U.S. 518 (1897).

[80] *Id.* at 525.

[81] *Id.* at 528. *See generally U.S. v. Grimaud*, 220 U.S. 506 (1911) (finding that the creation of the national forests was a valid exercise of congressional power).

[82] Act of June 4, 1897, ch. 2, 30 Stat. 34 (1897) (codified at 16 U.S.C. § 551) (repealed 1976).

[83] The national forests were originally part of the Department of the Interior, and were later moved to the Department of Agriculture. *Transfer Act of 1905*, ch. 288, § 1, 33 Stat. 628 (1905) (codified at 16 U.S.C. § 472).

regulations concerning national forests.[84] By 1901, the USFS required permits to graze livestock.[85]

These grazing permits were challenged in *Light v. United States*[86] which raised the question of whether the federal government's acceptance of the use of the public domain entitled private users to a vested property right. The Court held that the federal government's failure to object did not create a vested interest and that the United States could withdraw its consent for private individuals to use the public lands.[87] The federal government, therefore, has the authority to regulate private users on public lands. Furthermore, an individual cannot acquire rights without the express (as opposed to implied) permission of the United States.

B. Federal and State Rights on Public Lands

States have broad police powers over lands within their jurisdiction and frequently establish laws that affect public lands. In *Omaechevarria v. Idaho*,[88] for example, the Court held that segregating sheep from cattle on public lands was not an unreasonable or arbitrary exercise of the state's police power.[89] However, conflicts between federal and state laws governing public lands inevitably arise. The question of what law controls when the two differ was answered in *Kleppe v. New Mexico*.[90] In *Kleppe*, New Mexico challenged the authority of the federal government to establish a law concerning wild horses and burros on public lands, but a unanimous Supreme Court held that Congress' power over the public lands was plenary and virtually uncontrolled.[91] As a result, state law survives on the public range only so long as it does not conflict with federal policy.[92] But, in order for federal law to preempt state law, Congress must either explicitly express its intention to do so, or it must entirely occupy the field.[93]

---

[84] 16 U.S.C. § 551 (repealed).

[85] Abelson, *supra* n. 30, at 413 (citing Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests* 94 (1987)).

[86] 220 U.S. 523 (1911).

[87] *Id.* at 535.

[88] 246 U.S. 343 (1918).

[89] *Id.*

[90] 426 U.S. 529 (1976).

[91] *Id.* at 545.

[92] *Id.*

[93] *See Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1980) (finding that federal law preempted a local ordinance because both were land-use regulations); *Cal. Coastal Commn. v. Granite Rock Co.*, 480 U.S. 572 (1987) (concluding that the California Coastal Act was not preempted by federal law because it was an environmental, as opposed to land-use, statute).

Resource disposition is one of the areas where federal law preempts. The Supreme Court unequivocally articulated this principle in *Wilcox v. Jackson*,[94] finding that "whenever the question in any court, State or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States."[95] Therefore, Hage's right to forage cannot exist unless it was originally granted by federal law.

To summarize, in *Hage II*, Judge Smith found a property right for a rancher in the forage adjacent to water in the national forest.[96] Since federal law governs resource disposition on public lands,[97] and a vested right cannot be acquired against the government by implication,[98] a property right can only exist if the federal government explicitly granted it to Hage. As the following section will demonstrate, such a grant by the federal government was never made.

C. Federal Retention of the Land

The United States Court of Federal Claims found that Hage's right to graze cattle was linked to his vested water right under the Mining Act and Nevada state law.[99] According to Judge Smith, the Mining Act acknowledged Nevada law as the vehicle for determining water rights, and in Nevada the scope of that water right includes the right to graze.[100] This finding is based on "common sense," and "the conclusion that the United States intended to respect and protect the historic and customary usage of the range."[101] As the following discussion demonstrates, this reasoning breaks down in two fatal ways. First, policy and precedent show that the Mining Act specifically permitted only the water, and not the forage, to be conveyed by state law; and second, despite the courts implication in *Hage I*, Nevada water law does not grant a right to the forage superior to the United States, it merely defines the rights of private water users.

---

[94] 38 U.S. 498 (1839).

[95] *Id.* at 516–17. Cases throughout the years have repeated this principle. *See generally Utah Power & Light Co.*, 243 U.S. at 389 (finding that a state "may not . . . invest others with any right whatever in" public land); *Hunt v. U.S.*, 278 U.S. 96 (1928) (holding invalid state law objections to a federal deer population control program).

[96] *Hage*, 42 Fed. Cl. at 250.

[97] *Wilkox*, 38 U.S. at 516–17.

[98] *Light*, 220 U.S. at 535.

[99] *Hage*, 42 Fed. Cl. at 251 (stating that "implicit in a vested water right based on putting water to beneficial use for livestock purposes was the appurtenant right for those livestock to graze alongside the water").

[100] *Hage*, 35 Fed. Cl. at 174; *Hage*, 42 Fed. Cl. at 251.

[101] *Hage*, 42 Fed. Cl. at 251.

1. The Mining Act

For better or for worse, the law is not based on "common sense," but rather on precedent and rules.[102] Judge Smith's analysis is incomplete because he focused solely on the federal government's intent to protect the historic usage of the range without considering the history, case law, and the methods it used to protect the range. Because Hage cannot possess a right to the public range unless the federal government granted it, the determinative issue is whether the Mining Act explicitly included a grant of the forage to the states.

Prior to the passage of the Mining Act, settlers on the western public lands were "mere trespasser[s]" with "no rights as against the owner, the United States Government."[103] The federal government passively assented to their presence and thereby created an "implied license" to their use of the natural resources.[104] This uncontrolled system worked well in the early 1800s when there were few people. As the West became more populated, however, a new system was required for the sake of fairness and clarity. The first major stimulus for settlement in the West came in the mid-1800s with the discovery of gold.[105] A rush of pioneers poured into the West in search of riches and land to establish mines, "but the mines could not be worked without water."[106] Since the riparian doctrine[107] common in the East was not suited to the western environment, new rules and customs for the use of water based on "first in time, first in right" were developed and practiced in local mining camps.[108] Despite the first in time, first in right doctrine, the settlers were often insecure and unwilling to invest in the development of mines because they understood the United States was the ultimate owner of the resources and public domain.[109]

---

[102] *Id.*

[103] *U.S. v. Hunter*, 236 F. Supp. 178, 180 (S.D. Cal. 1964).

[104] *Buford*, 133 U.S. at 326. An "implied license" is defined as a license that "is presumed to have been given from the acts of the party authorized to give it." *Black's Law Dictionary* 634 (abridged 6th ed., West 1991).

[105] Frank J. Trealease, *Federal-State Relations in Water Law: Report for the National Water Commission* 58 (Natl. Technical Info. Serv. 1971).

[106] *Jennison v. Kirk*, 98 U.S. 953, 957 (1879).

[107] Doctrine of water use primarily found in the East that supports the "right which every person through whose land a natural watercourse runs has to benefit of stream as it passes through his land for all useful purposes to which it may be applied." *Black's Law Dictionary*, at 922.

[108] *Hunter*, 236 F. Supp. at 180. This system for acquiring resources is called prior appropriation. For a discussion of prior appropriation of water, *see generally* A. Dan Tarlock, *Law of Water Rights and Resources* §§ 5:1–5:99, 5-1-5-182 (West Group 2000).

[109] *Hunter*, 236 F. Supp. at 180.

The Mining Act was passed to promote the industrial development of the West by encouraging the "expenditure of time and money."[110] The main components of the Mining Act provided for the disposal of public land to miners. Nevertheless, it did contain a provision that was applicable to grazing livestock as well as mining. Section 9 states:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed.[111]

Congress later incorporated this provision in the Mining Act of 1870[112] specifying that:

> [A]ll patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the 1866 act.[113]

Thus, section 9 specifically recognizes private water rights on public lands. The Supreme Court later held that this section, and similar sections in subsequent laws, separated the land from the water and the water was "reserved for the use of the public under the laws of the states and territories."[114] Accordingly, most western states developed a system of water law based on the prior appropriation doctrine. Under this system, an owner of a water right is required to actually divert the water and apply it to some beneficial use.[115]

Hage claimed that the beneficial use to which he put his water was grazing, and that the water and the grazing right were therefore inextricably intertwined. However, a grant of the public domain and resources must originate from the federal government. Therefore, in order for Hage's claim and the *Hage II* ruling to be correct, section 9 must be read as an express conveyance from the federal government of the forage on the public range. This seems to be a

---

[110] *Id.* at 180–81. *See also Broder v. Natoma Water & Mining Co.*, 101 U.S. 274 (1879).
[111] Ch. 262, § 9, 14 Stat. at 253.
[112] Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217 (1870) (codified as amended at 30 U.S.C. § 661).
[113] *Id.*
[114] *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935).
[115] Coggins, *Public Land*, *supra* n. 7, at 365–66.

stretch.[116] To begin with, the plain language of the Mining Act identifies the "rights to the use of *water* for . . . agricultural . . . purposes."[117] Many of the remaining sections of the Mining Act detail the process through which a miner can acquire a vested interest in public *land*.[118] Section 9 would be repetitive if read to also grant a right to the public lands. Indeed, the Eighth Circuit Court of Appeals considered section 9 and found that it did not "either in letter or in spirit contemplate the use of ground within the public lands."[119]

In addition, the court in *Hage II* based its decision on the intent of Congress to "respect and protect the historic and customary usage of the range."[120] While this may be true, it does not necessarily follow that the federal government would grant the right to forage on the public rangeland. It is possible to preserve the "historic usage" of the range without disposing of it. In 1802, "the federal government adopted the policy of retaining title to all public lands" within state boundaries.[121] Furthermore, the Unlawful Enclosures Act evidenced a federal policy of keeping public lands accessible to all users. This act was passed in order to protect ranchers and maintain the traditionally open range.[122] The policy of the government was therefore aimed at both protection of grazing as a use and the retention of the public lands.

Next, interpreted broadly, *Buford*, *Camfield*, and *Light* stand for the proposition that a vested property interest in the public land can only be created by an affirmative grant and not by implication.[123] This position is strengthened by the fact that the government cannot lose title to lands through adverse possession.[124] In general, property rights in federal lands are "acquired only through federal patents."[125] This suggests that a vested interest in the forage on federal land should only occur in the event of an explicit grant by Congress. The *Hage II* court does not make such a finding. Instead, Judge Smith indicates that the right to graze livestock on the land is "implicit" in the vested water right because it provides the beneficial use of that water right.[126] This is significantly different than the specificity of a federal patent. Furthermore, this argument was

---

[116] Unfortunately, the Congressional Record for the Act of 1866 does not mention the water law provisions. *See* Dale D. Goble, *Prior Appropriation and the Property Clause: A Dialogue of Accommodation*, 71 Or. L. Rev. 381, 388 n. 31 (1992).

[117] 14 Stat. at 253.

[118] *Id.*

[119] *Utah Light & Traction Co. v. U.S.*, 230 F. 343, 345 (8th Cir. 1915).

[120] *Hage*, 42 Fed. Cl. at 251.

[121] Trealease, *supra* n. 105, at 75.

[122] *See Buford*, 133 U.S. at 326; *Light*, 220 U.S. at 535.

[123] *Buford*, 133 U.S. at 324–26; *Camfield*, 167 U.S. at 525–27; *Light*, 220 U.S. at 535.

[124] *See U.S. v. Cal.*, 332 U.S. 19, 40 (1947).

[125] Goble, *supra* n. 116, at 401 (citing *Gutierres v. Albuquerque Land & Irrigation Co.*, 188 U.S. 545, 552–53 (1903)).

[126] *Hage*, 42 Fed. Cl. at 251.

addressed by the Colorado Supreme Court 1901 when it rejected a claim by a rancher that the adjoining lands were appurtenant to his water right because they provided the means to use the water beneficially.[127] The Colorado Court stated:

> It might as well be argued that, because a vested right to the use of water had been acquired for irrigation purposes, there attached to such right as an appurtenance, land upon which to apply the water, as to say, as in this instance, there passed with the water right land in connection with which such water was utilized.[128]

The *Cleary* Court thereby found that the right to use water is distinct from the right to own the land. This reasoning applies with equal force to *Hage II.* Hage cannot acquire rights to the public rangeland simply because his beneficial use of the water requires land. Many uses of water require land. If Hage's claim were correct, each of these uses would be accompanied by an appurtenant right to the land. The result would be a net loss of millions of acres of public land by implication.

Furthermore, in *California Oregon Power Company*, the Supreme Court ruled that the Mining Acts of 1866 and 1870, as well as the Desert Land Act of 1877,[129] "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself."[130] The land, therefore, was separated from the water, and the two were not conveyed together. This holding suggests that when the states received authority to grant water rights to private individuals, it only included the right to the water and not the land. Thus, because there was no express grant of land to Nevada under the 1866 Mining Act, section 9 only conveyed the water. When Hage received his water right from the state of Nevada, it could not have included the right to graze cattle on the forage because Nevada never acquired this right from the federal government.

Three cases are particularly instructive for this analysis because they involve claims similar to that of Hage. In *Hunter v. United States*,[131] a rancher sought a right to water and an appurtenant right to graze his cattle in the Death Valley National Monument.[132] Like Hage, the basis for his claim was the Mining Act. Unlike the United States Court of Federal Claims, however, the Ninth Circuit Court of Appeals rejected the rancher's claim to graze livestock on public

---

[127] *Cleary v. Skiffich*, 65 P. 59 (Colo. 1901).

[128] *Id.* at 63.

[129] Act of March 3, 1877, ch. 107, 19 Stat. 217 (1877) (codified as amended at 43 U.S.C. §§ 321–339).

[130] 295 U.S. at 158.

[131] 388 F.2d 148 (1967).

[132] *Id.* at 150–51.

lands because it found that Congress did not intend to convey the public lands with the act.[133] Second, the plaintiff in *Gardner v. Stager*[134] claimed that "as a matter of prior appropriation" he had acquired the right to graze on public rangeland.[135] A federal court in the District of Nevada denied the claim stating that it flew "in the face of a century of Supreme Court precedent" and that grazing the public lands "was and is a privilege with respect to the federal government, revocable at any time."[136] Finally, in the most recent case, *Diamond Bar Cattle*, the Tenth Circuit Court of Appeals found meritless a rancher's claim that his water right, which vested under the Mining Act, included an "'inseparable' range right" that was "within the scope of their water right."[137] The court stated:

> Plaintiffs' interpretation of the Mining Act is contrary not only to the language of the Act itself, which simply recognizes rights to the use of water, but also to the well-settled body of law holding no private property right exists to graze public rangelands. The Act cannot fairly be read to recognize private property rights in federal lands, regardless of whether proffered as a distinct right or as an inseparable component of a water right.[138]

A similar analysis of the Mining Act should be applied by the Court of Federal Claims in the *Hage* case. If the Mining Act were read to limit the conveyed right to water, and not land, Hage would not be entitled to a right to the forage on the public lands. In light of recent precedent, it is likely that Judge Smith erred when he found that a right to forage was appurtenant to Hage's water right under the Mining Act.

2. Nevada Water Law

Judge Smith's inquiry in the *Hage I* case was not over when he determined that the Mining Act could be construed to grant private rights in the public range. Because the *California Oregon Power Company* case held that the water was severed from the land and was to be subject to the laws of the states,

---

[133] *Id.* at 154.
[134] 892 F. Supp. 1301 (D. Nev. 1995).
[135] *Id.* at 1302.
[136] *Id.* at 1303–04.
[137] 168 F.3d at 1215. The *Diamond Bar* Court distinguished its case from the *Hage* case based on the nature of the *Hage* case as a "takings." *Id.* at 1217. For the purpose of determining whether the *Hage* Court was correct in finding a property right to graze on the public land, however, the distinction is unimportant.
[138] *Id.* at 1215.

he next had to look to Nevada state water law[139] to qualify the nature and limit of those rights. As stated in *Hage I*, "If Nevada law recognized the right to graze cattle near bordering water as part of a vested water right before 1907, when Congress created the Toiyabe National Forest, plaintiffs may have a right to the forage adjacent to the alleged water rights on the rangeland."[140] The court then proceeded to examine Nevada law, specifically Nevada Revised Statutes sections 533.485 through 533.510, *Ansolbehere v. Laborde*,[141] *In re Calvo*,[142] and *Itcaina v. Marble*,[143] to conclude that Hage *did* have a vested right to the forage.[144] In doing so, it noted that "the right to use water on the public lands and the right to graze under Nevada law 'are inextricably intertwined.'"[145] It further suggested that the statute and case law stand for the proposition that Nevada law recognizes the right to use the public lands in its water law. For the sake of understanding the relationship between federal and state rights, and the property conveyed by the Mining Act, it is useful to reexamine the relevant law relied upon by Judge Smith. Upon closer scrutiny, it becomes apparent that Nevada water law does not (and cannot) grant a right to the forage superior to the United States; it merely defines the relative rights of private water users.

In *Basey v. Gallagher*,[146] the Supreme Court considered a case between two water users over who had the better right. The Court noted that "neither party has any title from the United States" and concluded that both were "trespasser[s] against the government."[147] Accordingly, "possessory interests created no independent rights against the proprietary interests of the government."[148] Stated another way, possession of the public lands does not establish a right. A right can only be established through a specific grant by the federal government. This principle can be applied to better understand the character of state water law.

For example, in *Hill v. Winkler*,[149] the New Mexico Supreme Court considered an issue similar to the one in *Hage*. It was asked to decide which of two parties had the prior right to graze on the public domain based on the Mining Act and section 19-3-13 of the New Mexico Statutes which states:

---

[139] Nevada, like most other states in the West, has adopted the doctrine of prior appropriation. *Jones v. Adams*, 6 P. 442 (Nev. 1885). Appropriation of water under this doctrine involves the "capture, impounding, or diversion of it from its natural course or channel and its actual application to some beneficial use . . . to the entire exclusion . . . of all other persons." *Black's Law Dictionary* at 68.

[140] 35 Fed. Cl. at 175.

[141] 310 P.2d 842 (Nev. 1957).

[142] 253 P. 671 (Nev. 1927).

[143] 55 P.2d 625 (Nev. 1957).

[144] *Hage*, 35 Fed. Cl. at 175.

[145] *Id.*

[146] 87 U.S. 670 (1874).

[147] *Id.* at 681.

[148] Goble, *supra* n. 116, at 395.

[149] 151 P. 1014 (N.M. 1915).

> Any person, company or corporation that may appropriate and stock a range upon the public domain of the United States, or otherwise, with cattle shall be deemed to be in possession thereof: provided, that such person, company or corporation shall lawfully possess or occupy, or be the lawful owner or possessor of sufficient living, permanent water upon such range for the proper maintenance of such cattle.[150]

Despite the questionable language of the statute, the court avoided the apparent violation of federal authority over the public lands by holding:

> [T]hat the [law] can be construed as not intending to grant any exclusive right in the use of the public domain, but, on the contrary, as attempting to provide that all those who seek to stock a range upon the public domain must, before doing so, lawfully possess, or be the lawful owner of, sufficient permanent water on such range for the proper maintenance of such cattle .... It is clear, however, that any attempt on the part of the Legislature to grant exclusive right or occupancy upon a part of a public domain would be clearly ... invalid.[151]

In sum, rather than finding that the statute breached principles of federal ownership of the public lands by granting it to private individuals, the *Hill* Court interpreted the statute to mean that in order to obtain a permit and be allowed to graze on public rangelands, an applicant had to first obtain a water right.

The *Hill* case provides a window to view how Nevada law *should* be interpreted. Rather than incorrectly finding that it confers a property right to the forage on an owner of a water right, as it has done, the *Hage II* Court would be well-advised to find that Nevada water law merely defines the rights of users relative to each other and not the federal government.

In fact, there is great support for this notion in Nevada case law. Not one of the three cases cited by Judge Smith in *Hage I* stands for the proposition that a Nevada water right permits a private individual to acquire a vested interest in the public rangeland. On the contrary, taken together, they acknowledge federal dominance over public lands and clarify the rights of individual users and the right of the state government to regulate if there is no federal preemption.[152] For example, in *Itcaina*, the court upheld the validity of a state stockwatering act commenting that "in the *absence* of [federal] government regulations, the state may regulate the use of unreserved and unappropriated public domain within its

---

[150] *Id.* at 1015.
[151] *Id.* at 1015–16.
[152] *Ansolbehere*, 310 P.2d at 842; *In re Calvo*, 253 P. at 671; *Itcaina*, 55 P.2d at 625.

borders."[153] Similarly, discussing a stock water area, the *Ansolabehere* Court stated that "the area had been directly committed by Congress to the Secretary of the Interior and the Bureau of Land Management."[154] Therefore, as reflected in these cases, Nevada water law acknowledges federal control of the public domain, and cannot fairly be read as creating a private right to forage in the public lands as the *Hage* Court has held.

3. Ditch Rights-of-Way

The *Hage II* Court seems to equate ditch rights-of-way with the right to forage.[155] Congress, in section 9 of the Mining Act, specifically recognized the right to a "ditch right of way."[156] Judge Smith defined the scope of ditch rights of way as "the ground occupied by the water and fifty feet on each side of the marginal limits of their ditch."[157] He then went on to find that "concurrent with the accompanying easement to perform ditch maintenance via the right-of-way, . . . [is] a limited right to forage . . . appurtenant to and a component of a vested water right."[158] The court thereby accepted Hage's claim that grazing provides the beneficial use of his water right and is therefore an inextricable component of his property interest in water. The extent of the right to forage he holds "is contiguous with the scope of the ditch right-of-way."[159]

Thus, Judge Smith accepts the very same argument that was rejected in *Hunter.* There, the Ninth Circuit Court of Appeals refused to allow the right to forage to be read into a ditch right-of-way because it would impose a greater burden on the open range than Congress specified.[160] Interpreting the act literally, the *Hunter* court noted that the language spoke only in terms of the "right of way for the construction of ditches and canals needful to conduct appropriate water from the public domain."[161] Cattle grazing of forage, it reasoned, was unlike a water conduit and thus the claim was denied.[162] Similar reasoning was employed in *Utah Light and Traction Company.* In that case, the Eight Circuit Court of

---

[153] 55 P.2d at 630.

[154] 310 P.2d at 846.

[155] *Hage,* 42 Fed. Cl. at 251.

[156] 43 U.S.C. § 661. This section verifies the existence of the right-of-way. Its dimensions are found in 43 U.S.C. §§ 946, 956, 959.

[157] *Hage,* 42 Fed. Cl. at 251.

[158] *Id.*

[159] *Id.*

[160] *Hunter,* 388 F.2d at 154.

[161] *Id.*

[162] *Id.*

Appeals found that the right-of-way provided for in the act was for constructs used "for the storing and transmission of the water itself" and nothing more.[163]

Under this rationale, Hage does possess a ditch right-of-way as provided for in the Mining Act, but it does not include the right to graze his cattle. This right-of-way entitles him to an easement for a conduit to transport his water off of, or across the public lands. It does not, however, entitle him to the use of the right-of-way to graze cattle on the forage, or any other possessory interest in the land.

IV. TAKINGS

After determining that Hage had a property interest in the forage on the public lands that attached to his water right, the court turned to the question of "whether or not a taking of [Hage's] vested water rights, ditch rights-of-way, forage rights, and surface estate" occurred when the USFS modified or revoked his permit.[164]

A. Takings Law

The Fifth Amendment dictates that "private property [shall not] be taken for public use, without just compensation."[165] The intent of the amendment is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[166] Although originally understood to limit only actual physical seizures of property, in *Pennsylvania Coal Company v. Mahon*,[167] the Court established the principle of regulatory takings by declaring that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[168] In order to determine if a regulation goes "too far," each case must be handled individually as an "ad hoc, factual" inquiry.[169]

In *Lucas v. South Carolina Coastal Commission*,[170] Justice Scalia grouped takings situations into three categories: A) Permanent physical occupations; B) Takings where the diminution in value is less than total (this involves an inquiry into the claimant's "distinct investment-backed

---

[163] *Utah Light & Traction Co.*, 230 F. at 345–46.
[164] *Hage*, 42 Fed. Cl. at 252.
[165] U.S. Const. amend. V.
[166] *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960).
[167] 260 U.S. 393 (1922).
[168] *Id.* at 415.
[169] *Penn. Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978).
[170] 505 U.S. 1003 (1992).

expectations");[171] and C) Takings where the owner is denied "all economically feasible use"[172] of the property (this is considered a per se taking unless the state can provide under state law that the property owner's use constitutes a nuisance).[173] This section explores the *Hage* "takings" question in light of the last two of Justice Scalia's categories, concluding that the USFS's actions did *not* constitute a taking because the USFS actions were within the authority of the federal government in its proprietary role, and Hage should have anticipated government action on his grazing permit.

B. Reasonable Investment-Backed Expectations

A regulation that interferes with a reasonable investment-backed expectation may constitute a taking.[174] This test originated in *Pennsylvania Central*, but remained largely undefined until *Lucas*. In that opinion the Court found that:

> When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.[175]

Thus, for Hage to prove a taking he must show that the USFS interfered with his *reasonable* investment-backed expectations for his water right by modifying or revoking his grazing permit.

---

[171] *Id.* at 1016 n. 7.
[172] *Id.* at 1016.
[173] *See* Marla Mansfield, *When "Private" Rights Meet "Public" Rights: The Problems of Labeling and Regulatory Takings*, 65 U. Colo. L. Rev. 193, 213 (1994).
[174] *Penn. Cent. Transp. Co.*, 438 U.S. at 120–21.
[175] *Lucas*, 505 U.S. at 1016 n. 7 (internal citations omitted).

1. Reasonable Expectations

In *Phillips Petroleum Company v. Mississippi*,[176] the Supreme Court emphasized that "expectations can only be of consequence where they are 'reasonable' ones."[177] In *Phillips*, Mississippi declared that the state held in public trust any lands "influenced by the tides," and could therefore lease the land to private companies for oil and gas exploration.[178] Petitioners, however, contended that they actually owned the land because Mississippi did not assume title to these "non-navigable" waterways at the time of statehood.[179] The Court held that because several cases had given Mississippi the right to tidelands, petitioner should therefore have expected that Mississippi owned the land at issue and that "any contrary expectations cannot be considered reasonable."[180] Like the plaintiff in *Phillips*, Hage should have considered the long-standing authority of the USFS to revoke a grazing permit for any reason when he invested in his property by purchasing the ranch and water right.

2. Expecting Future Regulation

The Supreme Court has frequently discussed an owner's "expectation of future governmental regulation."[181] In *Ruckelshaus v. Monsanto Company*,[182] the Court addressed a plaintiff's consideration of future regulation. In *Monsanto*, the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)[183] required an agency to disclose to the Environmental Protection Agency data submitted during registration of a pesticide.[184] Monsanto claimed that the statute constituted a taking because it required the disclosure of trade secrets.[185] The Court held that a taking did not occur because the heavily regulated character of the pesticide industry should have alerted Monsanto to the possibility of the action.[186] The important concept from *Monsanto* is that notice of a government regulation can limit a plaintiff's investment-backed expectations.

---

[176] 484 U.S. 469 (1988).
[177] *Id.* at 482.
[178] *Id.* at 472.
[179] *Id.* at 475.
[180] *Id.* at 482.
[181] Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Taking Analysis*, 70 Wash. L. Rev. 91, 111 (1995).
[182] 467 U.S. 986 (1984).
[183] 7 U.S.C. §§ 136a–136y (1994).
[184] *Monsanto*, 467 U.S. at 991.
[185] *Id.* at 998–99.
[186] *Id.* at 1013.

The public range is no less regulated than the pesticide industry. Hage knew when he purchased Pine Creek Ranch that his grazing permit would be subject to USFS regulations and that it was entirely possible that the USFS would take action on his permit, especially if the terms of that permit were not met. He therefore assumed the inherent regulatory risk when he purchased the property. This risk was part of his reasonable investment-backed expectations.

Further, *Dames and Moore v. Regan*[187] and *Bowen v. Public Agencies Opposed to Social Security Entrapment*[188] stand for the proposition that a property right that is expressly conditioned on the right of the government to nullify the right is not entitled to takings protection. In *United States v. Fuller*,[189] the plaintiff owned land whose value increased as a result of a federal permit to graze his cattle on adjacent public land.[190] The Court denied the plaintiff's claim that he was entitled to compensation for the value the permit added to his private land when the permit was revoked because it found no property interest in the grazing permit and the government had reserved the right to revoke.[191] In a broad sense, *Fuller* stands for the idea that the government is not required to pay for value added to a plaintiff's property as a result of the revocation of a grazing permit.[192] As previously discussed, in *Hage*, the USFS specifically reserved the right to suspend, revoke or amend the Pine Creek Ranch grazing permit.[193] It therefore follows that because Hage was on notice when he invested in his ranch that the government had the authority to revoke, modify or suspend his grazing permit, under the holdings of *Monsanto, Dames and Moore*, and *Fuller*, he should not be extended protection under the Takings Clause.

C. Background Principles of Law

Unless the government can show that an action "inhere[s] in the title itself" or is contemplated by the "background principles of the State's law of property and nuisance," a regulation that denies a property owner all economically viable use of the property is a per se taking.[194]

---

[187] 453 U.S. 654, 674 (1981).
[188] 477 U.S. 41 (1986).
[189] 409 U.S. 488 (1973).
[190] *Id.*
[191] *Id.* at 492–94.
[192] *Id.*
[193] *See supra*, n. 27–32 and accompanying text.
[194] *Lucas*, 505 U.S. at 1029.

1. Definition of Property

Much of the battle in takings litigation is over the definition of the lost property interest itself. A narrow definition of property is more likely to result in a finding of a taking. The two main techniques used by courts to define the property impacted by government action are "conceptual severance, which considers each strand of property right individually, and physical unity, which rejects reifying 'rights' and clings to a literal earth-based definition."[195] The court in *Hage II* seems to adopt the conceptual severance approach by defining the property narrowly and finding that if the government revokes the grazing permit, it constitutes a complete taking of the water right. This conclusion, however, may not be accurate. Rather, it is likely that Hage retains some value in his water right even if the federal government revokes the right to graze. The *Hunter* Court, for example, recognized that a ditch right-of-way existed which allowed the plaintiff to remove his water from the federal land reservation.[196] This is likely an option for Hage. In addition, Hage might be able to change the point of diversion for his water right.[197] Either way, it follows that the value of Hage's water right was not completely eviscerated by the revocation of the grazing permit because Hage retains legal options for the use of his water.

However, even assuming that there is a complete loss of economically viable use, a taking should not be granted for Hage because the background principles of water law and public land law allow for regulation of the grazing permit, and the "state is not 'taking' something belonging to an owner, but asserting a right it has always held as a servitude burdening owners of water rights."[198]

2. Water as Property

One of the essential background principles to consider in a takings claim is the nature of the property interest involved. Water rights are considered property under state law and through the Fourteenth Amendment are entitled to the protection of the Fifth Amendment.[199] It is not the water itself, however, that

---

[195] Mansfield, *supra* n. 173, at 231.

[196] Hunter, 388 F.2d at 154.

[197] *See* Nev. Rev. Stat. § 533.345 (1991).

[198] Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law* 20 (Nat. Resources L. Ctr. 1990).

[199] Trealease, *supra* n. 105, at 71.

is property, but the right to use water.[200] The Supreme Court confirmed this principle stating that a water right owner "owns no property in the water itself, but a simple usufruct while it passes along."[201]

The nature of a property right in water is distinguishable from land in several ways. First, the right to use water is not exclusive. Under the prior appropriation system, it is necessary to use water for a beneficial purpose. Water that is not used by a senior appropriator may be used by other users. In addition, upstream water is often used and returned to the stream for re-use by other users. Thus water right holders "lack a right to exclude,"[202] and water has been called "property of the public."[203]

The public nature of water is further evidenced by provisions in several western state constitutions that explicitly recognize the common public interest of water. For example, the Colorado Constitution states in relevant part:

> The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.[204]

Finally, one of the strongest statements of the public nature of water rights came from the Supreme Court in *Hudson County Water Company v. McCarter.*[205] Speaking for the Court, Justice Holmes stated:

> [F]ew public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots . . . . The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may

---

[200] Andrew H. Sawyer, *Symposium: Environmental Protection and the Politics of Property Rights: Changing Landscapes and Evolving Law: Lessons from Mono Lake on Takings and the Public Trust*, 50 Okla. L. Rev. 311, 343 (1997).

[201] *Atchison*, 87 U.S. at 512.

[202] Sawyer, *supra* n. 200, at 343.

[203] Barton H. Thompson, Jr., *Takings and Water Rights*, in *Water Law: Trends, Policies, and Practice* 43, 47 (Kathleen Marion Carr & James D. Crammond eds., Am. Bar Assn. 1995).

[204] Col. Const. art. XVI, § 5.

[205] 209 U.S. 349 (1908).

not substantially diminish one of the great foundations of public welfare and health.[206]

An important background principle of a water right is, therefore, the public nature of water. Inherent in every water right is the concept that it may not be used to "diminish" the public welfare. This means that Hage's water right, like all other water rights, is, by its very nature, subject to restrictions and regulations from the government. This background principle accordingly intimates against finding that a revocation of Hage's grazing permit constituted a taking based on the loss of forage that was appurtenant to his water right.

3. Federal Authority to Regulate Grazing

Lastly, Hage cannot claim a taking if "the proscribed use interests [he seeks] were not part of his title to begin with."[207] As previously discussed, in this case they were not. The federal government has plenary power over the public lands. It has used this authority on the public range to require grazing permits as early as 1901. Even assuming that Hage has a property right to forage appurtenant to his water right, that property right is burdened with the "background principle" that the federal government has the authority to revoke his grazing permit.

V. CONCLUSION

The American West has been shaped and characterized by water, or more accurately, by the lack of water. The aridity of the West played a significant factor in federal retention of public lands in the region by rendering impractical eastern-influenced attempts at disposition. "[F]arms and ranches are either densely concentrated where water is plentiful or widely scattered where it is scarce . . . ."[208] It should, therefore, come as no surprise that water is once again at the heart of a controversy over control of the western public lands.

Rancher Wayne Hage claims that he has a property right in the public rangelands because the right to graze is inextricably intertwined with his vested water right. Hage may have convinced a court that he is correct. The United States Court of Federal Claims appears to be on the verge of making a revolutionary decision that would have broad implications and severely limit federal control of the public lands. There is no historical or legal precedent for

[206] *Id.* at 356.
[207] *Lucas*, 505 U.S. at 1027.
[208] Wallace Stegner, *The American West As Living Space* 8 (U. Mich. Press 1987).

Hage's contention, and the court should reconsider its "preliminary opinion." If it does not, much of the public lands will forever pass into private hands.

JEFFREY J. WECHSLER